FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 26 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 3 [illegible]

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AND ITS SOUTHERN CALIFORNIA BRANCH, AS AMICI CURIAE.

OSMOND K. FRAENKEL,
Of Counsel,
American Civil Liberties Union,

A. L. WIRIN,
Of Counsel,
American Civil Liberties Union,
Southern California Branch.

INDEX.

	PAGE
Statement	2
The Issues	3
The Editorials	4

CASES.

Grosjean v. American Press, 297 U. S. 233	3
Patterson v. Colorado, 205 U. S. 454	6
Stromberg v. California, 283 U. S. 359	2n
Thornhill v. Alabama, 310 U. S. 88	3
Young v. California, 308 U. S. 147	2n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 64.

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AND ITS SOUTHERN CALIFORNIA BRANCH, AS AMICI CURIAE.

The American Civil Liberties Union and its Southern California Branch, with leave of the California courts below, appeared as amici curiae, both in the Superior Court of Los Angeles County and in the Supreme Court of California. We unsuccessfully urged upon the California courts the rejection of the "tendency" doctrine—commonly designated as the "dangerous tendency" or "inherent tendency" rule and the adoption of either the "actual obstruction" principle, or the "clear and present danger" rule, to alleged contempts by publication.

The Interest of the American Civil Liberties Union, and its Southern California Branch.

The American Civil Liberties Union is an organization of citizens who are concerned with the preservation and extension to all, of constitutional liberties as guaranteed by the Bill of Rights in the Constitution of the United States. The political philosophy of most of its members is commonly designated as "liberal." Its Southern California Branch has a particular interest in this case because the "Los Angeles Times" has, for over half a century, been a vigorous and active mouthpiece of the anti-labor and open-shop employer interests in Southern California. For fifty years it has had much to say in its editorial columns upon many public issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other than for itself and for those in its, and its publisher's economic class. When Yetta Stromberg,[1] California radical, and Kim Young,[2] Los Angeles student, asserted that they had been deprived of freedom of speech, the "Times" maintained a studied silence. Now that its own freedom is affected it protests stoutly that its freedom of speech has been abridged by its conviction for contempt of court. The American Civil Liberties Union and its Southern California Branch join in the protest. We want it clearly understood, however, that our appearance is as a "friend of the *Court*," and *not* as a friend of the "*Times*."

The American Civil Liberties Union is submitting a brief in this case, as well as in the companion case of *Bridges* v. *California*, No. 19, because it believes that the issues raised in these cases are of supreme importance in connection with freedom of speech and of the press. Since the basic legal problems in both cases are the same we shall

---

[1] *Stromberg* v. *Calif.*, 283 U. S. 359.

[2] *The Leaflet Cases, Young* v. *Calif.*, 308 U. S. 147.

not here repeat the arguments developed in the *Bridges* brief. We there contended that the power to punish for contempt of Court is subject to the same constitutional restrictions as is the legislative power to punish for crime and that in the absence of a showing that there was "a clear and present danger" of interference with the freedom of the judiciary, punishment was improper.

The Issues.

The observations there made are particularly appropriate here, since this case, unlike the *Bridges* case, deals with a comment by a newspaper on matters of general public concern. This Court has repeatedly recognized the importance of a free press. As was said in *Grosjean* v. *American Press Company*, 297 U. S. 233, at 250:

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In consequence a tax law was declared void because aimed at a particular kind of newspaper.

Again in *Thornhill* v. *Alabama*, 310 U. S. 88, it was said:

> "Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the process of popular government."

And judges, as well as legislators, may well give heed to the will of the people as expressed through the give and take of newspapers and periodical discussion.

We shall, therefore, concern ourselves in this brief primarily with an analysis of the various articles challenged as being contemptuous. These were originaliy five in num-

ber (R. 9-25); two additional charges were filed growing out of the contempt proceedings themselves (see R. 138). The Trial Court held that only three of the original charges constituted contempts (R. 60). The Appellate Court upheld the charge as to these three articles but reversed the conviction based upon the additional charges (R. 139)—in consequence the record in connection with those two additional charges is not before this Court.

The Editorials.

1. The first charge was based upon an editorial which approved as a warning to union terrorists a jury verdict convicting sitdown strikers. The editorial was written before the expiration of the time for the defendants to move for a new trial and before the date fixed for sentence. It was charged that the editorial had been written to induce the judge to give a strong sentence. The editorial is to be found in the record at page 11. There is no suggestion in the editorial whatever directed toward action by the judge. It in substance reiterated sentiments of gratification over the verdict expressed in a radio address by the District Attorney who prosecuted the case (see R. 11)—and it does not appear that any contempt proceedings were instituted against the District Attorney. The Trial Judge himself apparently found no need to institute proceedings of contempt against anyone and there is no proof that he saw the editorial in question.

The Court which tried the charges found this editorial to be contemptuous in part because it might influence the judge in fixing sentence or granting probation (R. 111) and in part because prospective jurors on a possible second trial would have been influenced by the editorial (R. 110). The Appellate Court upheld the charge of contempt on the ground that the editorial was "capable of being construed" that no leniency should be extended to the defendants

and that if such leniency were extended the judge would be criticized (R. 128).

Even within the test laid down by the California courts, a test we believe this Court will repudiate, it is difficult to see how an editorial such as this could reasonably affect any judge improperly. Surely under any doctrine which has a proper regard for the constitutional guaranty of a free press, this editorial cannot be found to be contemptuous. Otherwise newspapers must avoid all comment on legal proceedings, whether favorable or adverse, until the last legal step shall have been taken, though that be years after the original verdict. It is not possible, either on logical grounds or those of expediency, to draw any line once the jury has performed its functions. If it is not permissible to criticize a trial judge because he has under consideration a motion for a new trial, then it must likewise be impossible to criticize the decision of the trial judge while there is pending an appeal in the higher courts and so on until every legal recourse has been exhausted, including applications to this Court and applications for rehearing. And even then it can be argued that newspaper comments on a particular decision will influence the judges who participated in it in their future decisions—for if the newspaper expresses its opinion, whether favorable or adverse, it will indicate clearly to the judges what is expected of them in similar situations in the future. But, of course, no such absurd result is possible. The best way to prevent it, however, is to stop at the threshold the application of the nonsensical doctrine that any comment about a case under advisement by a judge constitutes a contempt.

2. The Trial Court having sustained a demurrer to the second count we shall now deal with the third. The editorial here involved (R. 17) is of the same character as that already considered: approval of a verdict before sentence, again without any suggestion as to the sentence itself. In discussing this editorial the Trial Court also com-

mented upon the fact that the editorial referred to the past political activity of one of the defendants, matters not involved in the criminal case. The Court said that the discussion of such extraneous matter was prohibited (R. 113). In the Appellate Court this editorial was held contemptuous because it "would have a disturbing effect upon the judge before whom the case was pending" (R. 130). This conviction is all the more remarkable because the article in question did not, as did the first editorial, deal at length with the pending case—indeed no specific mention is made of it, although it was undoubtedly in the mind of the writer and included in the casual reference to criminal prosecutions. Essentially this editorial consists of the review of the career of one of the defendants, a minor political boss. To punish the publication of such matter would be to prevent the discussion of the affairs of any public character during the time that legal proceedings involving that public character might be pending. Surely judicial independence neither needs nor is entitled to any such protection.

3. The last of the editorials upon which the contempt conviction rests is the only one which urges any action by the judge involved. That editorial (R. 23) approved a conviction of some labor racketeers and (R. 24) said that the trial judge "will make a serious mistake if he grants probation." The article was held contemptuous because written while the judge had before him an application for probation (R. 116). In the Appellate Court it was said that little "can be said" in defense of the publication of that editorial. It was described as an example of "intimidation" which had been condemned by this Court in *Patterson* v. *Colorado*, 205 U. S. 454 (R. 131). We cannot believe that decision still to represent the views of this Court.

The Appellate Court rejected petitioner's argument that it had the same right in its newspaper to express its views

concerning the attitude of the judge toward an application for probation as any member of the community had (R. 132). The Court was unable to find any basis for such contention, indicating that if permissible there might be a heated newspaper controversy while the question of probation was before the Court for determination. The Appellate Court, however, rested its decision not merely on this consideration, but also on the fact that sentence had not yet been imposed. Thus the third editorial was held contumacious on the same grounds as the Court had held the other two so to be (R. 133).

It should be said, however, in connection with this last editorial that the judge affected saw no need for a prosecution. And, while the language of the editorial was vigorous and emphatic, treatment of the subject was restrained and respectful. We respectfully submit that no suggestion made to a judge with regard to the action he should take, though he be addressed by name, should be considered contemptuous unless, by its tone and manner, it seeks to exert improper pressure upon the judge. Surely judges have the same right to know what is the opinion of the community in which they live as have other officers of government.

Particularly should this be the case where the person charged with contempt has maintained a consistent policy over a long period of years on some of the subjects involved in the cases discussed. An affidavit on that subject was made by Mr. Chandler, the President of the newspaper (R. 42-52). It was not in any way controverted. Nevertheless, the Appellate Court held that it was for the Trial Court to determine what weight should be given to this evidence (R. 134). However, the statement in the opinion that the affidavit merely caused a "conflict in the evidence" is without basis in the record. It is pertinent, moreover, to note that the trial judge did not rest his decision upon any disbelief in the statement contained in this affidavit. He merely said that even though the attitude

of the "Los Angeles Times" had been known in the community, as stated in the affidavit, the language of the editorials, particularly of the last one, was not thereby excused (R. 116).

We have adverted to this because it is our belief that whether or not a particular editorial can reasonably be held to constitute an interference with the independence of the judiciary depends upon all of the circumstances, of which the general policy of the newspaper certainly is one.

CONCLUSION.

It is respectfully submitted, therefore, that the judgment under review should be reversed because to punish as contemptuous the editorials complained of would be an infringement of freedom of the press.

OSMOND K. FRAENKEL,
Of Counsel,
American Civil Liberties Union,

A. L. WIRIN,
Of Counsel,
American Civil Liberties Union,
Southern California Branch.